Randall, Burkart/Randall, Division of Textron, Inc. ***and*** **United Automobile, Aerospace and Agricultural Implement Workers of America, and Local No. 1249.** Case 26-CA-7032

July 21, 1981

DECISION AND ORDER

On August 14, 1980, Administrative Law Judge Robert Cohn issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel filed exceptions and a supporting brief to which Respondent filed a reply brief, and the Charging Party filed cross-exceptions and a supporting brief to which Respondent filed a separate reply brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order,[1] as modified herein.

The Administrative Law Judge found that Respondent did not unlawfully solicit strikers Woodrow Robinson and Gary Stevens to return to work during the strike. We agree with the Administrative Law Judge's finding regarding employee Robinson. Contrary to the Administrative Law Judge, we find that Respondent violated Section 8(a)(1) by soliciting employee Stevens to abandon the strike.

The record indicates that, during the strike, Robinson wanted to return to work but did not want to go to the plant in order to sign Respondent's recall list because he feared retaliation against himself and his family. Instead, Robinson phoned Plant Manager Jack Melvin. Melvin sent Personnel Director Mooneyhan to Robinson's home. After Mooneyhan explained the recall list's purpose, Robinson signed it.[2]

During the conversation between Robinson and Mooneyhan, employee Stevens, who lived across the street from Robinson, was standing in his yard. When he saw Stevens, Robinson suggested that Mooneyhan ask Stevens if he wished to return to work so that Stevens would not think Robinson signed the list or was helping Respondent. Mooneyhan then crossed the street and asked Stevens whether he wished to sign the recall list.

Unlike Robinson, therefore, it is apparent that Stevens did not seek out Respondent for purposes of signing the recall list. Nor did Stevens know that Mooneyhan came to his house at Robinson's suggestion. In these circumstances, we find that Respondent violated Section 8(a)(1) by soliciting Stevens to abandon the strike.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Randall, Burkart/Randall, Division of Textron, Inc., Blytheville, Arkansas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1(f) and reletter the following paragraph as 1(g):

"(f) Soliciting its employees to discontinue striking or other concerted activities on behalf of United Automobile, Aerospace and Agricultural Implement Workers of America, and Local No. 1249."

2. Substitute the attached Appendix A for that of the Administrative Law Judge.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to offer to qualified unreinstated strikers the opportunity to bid on special rated jobs in preference to strike replacements on the payroll.

[1] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

[2] Robinson returned to work the next week.

[3] This isolated instance of unlawful solicitation does not otherwise taint Respondent's recall list. Stevens was only 1 of about 400 production and maintenance employees. And there is no evidence indicating that other employees did not sign the list voluntarily.

WE WILL NOT refuse to accord to recalled economic strikers their right to shift preference.

WE WILL NOT transfer security guards to production jobs in preference to unreinstated economic strikers.

WE WILL NOT refuse to reinstate economic strikers in preference to hiring or recalling strike replacements.

WE WILL NOT require reinstated economic strikers to undergo waiting periods for resumption of their group life, accident, and medical insurance coverage.

WE WILL NOT solicit our employees to discontinue striking or other concerted activities on behalf of United Automobile, Aerospace and Agricultural Implement Workers of America, and Local No. 1249.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by the National Labor Relations Act.

WE WILL offer reinstatement and backpay, with interest, to any unreinstated strikers who were unlawfully denied an opportunity to bid upon special rated jobs because we preferred strike replacements then on the payroll.

WE WILL offer reinstatement and backpay, with interest, to any striker who was unlawfully denied reinstatement because we hired or recalled strike replacements to production jobs, or transferred security guards to production jobs following the termination of the strike on October 16, 1977.

WE WILL reinstate the practice of shift preference in the manner in which it existed prior to the strike which commenced on September 8, 1977.

WE WILL make whole all striking employees for any losses they may have suffered through lack of group insurance coverage subsequent to the date they returned to work, or would have returned to work, but for the unlawful cancellation of such insurance coverage because our employees went on strike.

RANDALL, BURKART/RANDALL, DIVISION OF TEXTRON, INC.

DECISION

STATEMENT OF THE CASE

ROBERT COHN, Administrative Law Judge: This proceeding, held pursuant to Section 10(b) of the National Labor Relations Act, as amended (herein the Act), was heard before me at Blytheville, Arkansas, and Memphis, Tennessee, on various dates between November 13, 1978, and September 17, 1979, upon due notice.[1] The original charge in the matter was filed by United Automobile, Aerospace and Agricultural Implement Workers of America, and Local No. 1249 (herein the Union), on January 16, 1978, upon which counsel for the General Counsel, through the Regional Director for Region 26, issued a complaint and notice of hearing on March 1, 1978. This complaint was amended on several occasions before and during the hearing herein.

The principal issue to be resolved is whether Randall, Burkart/Randall, Division of Textron, Inc. (herein Respondent or the Company), violated Section 8(a)(3) and (1) of the Act with respect to its alleged failure to reinstate strikers promptly upon their unconditional offer following a strike at Respondent's Blytheville, Arkansas, plant in the fall of 1977. Also presented for resolution are several issues of alleged independent violations of Section 8(a)(1) of the Act by agents or supervisors of Respondent, as hereinafter detailed.

Following the close of the hearing, post-hearing briefs were filed by counsel for all parties, which have been carefully considered.

Upon the entire record in the case, including my observation of the demeanor of the witnesses,[2] I make the following:

FINDINGS AND CONCLUSIONS[3]

The Alleged Unfair Labor Practices

A. *Background*

At its Blytheville plant, Respondent is engaged in the manufacture of various types of automotive trim such as body side moldings, wheel openings, hubcaps, and headlight openings. The material utilized in such production is primarily stainless steel and aluminum. Respondent produces several hundred types of products annually, primarily for its customers who are the major automobile manufacturers.

The normal employee complement of production and maintenance employees in the plant numbers approximately 400. These employees are distributed throughout the plant in various numbered departments such as large press, small press, anodize, shipping, receiving, and the like. It is important to note for the purpose of the issues in this case that while the production employees are distributed among the several departments, as noted, the rate of pay of the production workers is substantially the

[1] Adjournments were taken primarily for the purpose of allowing counsel for the General Counsel to peruse and copy certain of the business records of Respondent; also, on May 22, 1979, counsel for the General Counsel filed a request for a special appeal to the Board from a ruling of mine, which was ruled upon by the Board on August 1, 1979. The hearing was closed by order dated February 19, 1980.

[2] Cf. *Bishop and Malco, Inc., d/b/a Walker's*, 159 NLRB 1159, 1161 (1966).

[3] There is no issue as to the jurisdiction of the National Labor Relations Board, or the status of the Union as a labor organization. The complaint alleges sufficient facts, which are admitted by answer, upon which I may, and do hereby, find that Respondent is engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act, and that the Union is a labor organization within the meaning of Sec. 2(5) of the Act. See also *Randall, Burkart/Randall, Division of Textron, Inc.*, 240 NLRB 263 (1979), of which judicial notice is taken.

same. In this connection, the record shows that, while a particular classification of a production employee may be assigned to a certain department at any given time, such employee's skills may be equally adapted to—and he may be called upon to perform—similar functions in another department of the plant. Indeed, the record reflects that production employees have historically been moved throughout the plant as needed to perform production work. However, it should be equally noted that there are some production jobs in the plant which are denominated "special rated jobs" which carry a higher rate of pay, such as buffing, rolls, tool and die, maintenance, and inspection. Nevertheless, as in the case of a normal production employee, the record reflects that a special rated employee may perform substantially similar work for the same rate of pay in different departments.

Thus, it appears that Respondent does not run an assembly type operation where an employee performs a specific job in a specific place every day. Rather, as noted above, an employee who may be classified as a press operator, for example, might operate a press in one department one week while operating a different press in another department the following week because of a variance in orders received.

With respect to the manner and flow of production in Respondent's facility, it appears that the volume and types of such production are dictated primarily upon customers' "releases" which Respondent receives at least once per week, and sometimes more frequently. Such releases are orders for parts which, in turn, regulate and direct which particular machinery Respondent utilizes in order to produce the orders.

With respect to the volume of production, such volume is predicated primarily, of course, upon the customers' weekly orders. However, Respondent also engages in some production for inventory purposes, particularly during an annual period when a collective-bargaining agreement is scheduled to terminate. During such years, the customers of Respondent require that Respondent build up an inventory of principal parts which would enable them to be supplied for a period of at least 30 days in the event of a work stoppage.

With respect to the level of the employee complement of production workers, the plant manager testified without contradiction that his principal objective was to operate the plant in the most efficient manner with the least number of employees. In furtherance of such objective, he testified that during the last week of each month the principal officials at the plant confer respecting projected sales figures and finished goods inventory, and project the amount of production needed and determine the number of employees required to fulfill production schedules. The actual assignment of employees throughout the plant is controlled by lower level supervision.

With respect to the representation by the Union of the production employees of Respondent, the record reflects that the Union, in fact, represented such employees for a number of years prior to the events giving rise to the issues in this case.[4] The last collective-bargaining agreement between Respondent and the Union was due to expire on September 1, 1977. Negotiations between the parties commenced during the summer of 1977, but no agreement was reached by September 1, and the parties agreed to extend the contract from September 1 to September 6, 1977. Agreement was still not reached by the parties on a contract by that time, and on September 8, 1977, the Union commenced an economic strike on that date in both units. The record reflects that, at the outset of the strike, all production and maintenance employees participated with the exception of approximately five janitors and one production employee.

B. *Events Transpiring During the Strike*

As noted, substantially all of the production and maintenance employees employed by Respondent on September 8, 1977, originally participated in the strike.[5] The strike continued until October 16, 1977, at which time the Union notified Respondent that it was willing to accept Respondent's last offer and end the strike effective October 16, 1977. The Union also applied unconditionally, on behalf of all strikers, for reinstatement to their old jobs, and submitted to Respondent a list containing the names of all strikers in order of their seniority for purposes of reinstatement. However, during the course of the strike, on or about September 19, in its personnel office, Respondent commenced the maintenance of a list of strikers who indicated a desire to return to work. There is no evidence that this list was promulgated or established for the purpose of soliciting strikers to return to work, but rather was utilized as a means to orderly record the strikers who came into the office and so indicated his or her desire to return to work. Accordingly, I find no violation of the statute by the establishment and maintenance of such a list by Respondent during the course of the strike.

The record reflects one instance of alleged unlawful solicitation of a striker to return to work during the course of the strike. This concerned employee Woodrow Robinson who did not desire to go to the plant for purposes of signing the aforesaid recall list for fear of retribution to himself and his family. Accordingly, Robinson telephoned Plant Manager Jack Melvin respecting his desire to return to work. Under the circumstances, Melvin directed Personnel Director Mooneyhan to go to Robinson's house for the purpose of allowing him to sign the list. According to Robinson's testimony at the hearing, Mooneyhan explained that the list was one of strikers who had either returned to work or desired to return to work, and that if Robinson so returned, the latter would keep his seniority over the new drivers which Respondent had hired. Robinson signed the list and returned to work the following week.

[4] The Union, in fact, bargained with Respondent with respect to two separate units: (1) a production and maintenance unit, and (2) a tool-and-die unit. However, the latter unit was much smaller than the former and is not directly involved in this proceeding.

[5] There is no question but that the strike, which was called by the Union in an effort to enforce its economic demands, was from the inception an economic—as distinguished from an unfair labor practice—strike. One of the contentions of the General Counsel is that such strike was converted to an unfair labor practice strike during its existence; however, I find no substantial evidence in the record to sustain that contention.

The record reflects that another striking employee, Gary Stevens, lived across the street from Robinson and apparently was standing in his yard during the Robinson-Mooneyhan incident, described above. Robinson, in a prehearing affidavit, stated that he saw Stevens in his front yard and suggested that Mooneyhan go over to Stevens' house and ask the latter if he wished to return to work—that this suggestion was made "so Stevens wouldn't think I signed the list or that I was helping the Company." Mooneyhan did, in fact, go across the street and ask Stevens whether the latter wished to sign a list to return to work. Stevens responded that he would "wait it out until the strike was over."

Thus, the evidence shows that the solicitation by Respondent's agent of two strikers to return to work during the strike was prompted by the request of one of the strikers; and that such occasion was the sole incident reflected by the record of such solicitation among several hundred strikers. Accordingly, I conclude and find that the General Counsel did not sustain the allegation in the complaint that Respondent unlawfully solicited strikers to abandon their concerted activities in violation of Section 8(a)(1) of the Act.

The record reflects that, during the course of the strike, Respondent hired some 422 employees as permanent replacements for strikers.[6] In addition, the record reflects that, commencing shortly after the strike began, strikers commenced returning to work with the Company.[7] Accordingly, when the strike terminated, the employee complement numbered approximately 360.

C. *The Procedure Respecting Reinstatement Following the End of the Strike and Other Events*

The evidence shows that, following the end of the strike on October 16, 1977, Respondent adopted and placed into effect the following procedure respecting the method of recalling and reinstating strikers to production jobs which were necessary to be filled either through a vacancy created by a departure of a striker replacement (or a striker who had returned to work), or an expansion of its work force.[8] Respondent would first offer the production job to a striker who had signed the first list maintained in the personnel office during the strike; after this list was exhausted, the Company would then offer that job to the first person on the seniority list submitted by the Union. With respect to a vacancy in a special rated job, above referred to, the Company would first seek to fill such vacancy from among its workers in the plant who possessed the necessary qualifications at the time the vacancy arose. If this were unsuccessful, the Company would then look to the first signup list in order to ascertain whether any person on that list had previously performed the special rated job; if unsuccessful there, the Company would then seek the most senior person on the union list who had performed the job prior to the strike. It is unrefuted that, following the end of the strike, the Company hired no new employees into positions held by strikers.

It is one of the principal contentions of counsel for the General Counsel that, following the end of the strike, the Company wrongfully and unlawfully transferred striker replacements to other jobs in the plant, including special rated or "bid" jobs, which should have been first offered to strikers. Since this issue constitutes a cardinal one in the case, it seems appropriate to discuss and dispose of it at this juncture.

At the outset, it appears that there are several types of transfers involved which must be differentiated: (1) temporary transfers of similarly classified employees to other departments; (2) transfers of employees to another classification on a temporary basis not to exceed 10 working days; (3) permanent transfers of employees in special rated jobs which requires a posting procedure; and (4) permanent transfers of production workers to another classification which requires a posting procedure.[9]

It is clear from the unrefuted testimony of Respondent's officials that, due to the differing types of production orders which arise weekly (or more often), there is a need for Respondent frequently to transfer production employees from one department to another in order to care for such production schedules. Thus, in such cases, an employee, or employees, may be transferred from one department to another for a short period of time to work on a similar machine in the latter department in order to satisfy the production requirement. It is a contention of counsel for the General Counsel that the necessity for such a transfer creates two "vacancies" for which Respondent should have recalled nonreinstated strikers; i.e., the "vacancy" which gave rise to the transfer, and the "vacancy" created by the departure of an employee to the department where the production was required. In the light of Respondent's past practice in this regard which is dictated by its particular production system, above described, and confirmed by the pertinent provisions of the collective-bargaining agreement, it is my view that no "vacancy" within the meaning of *Laidlaw*[10] and its progeny existed in this category for which an unreinstated striker was required to have been recalled. Accordingly, this contention of counsel for the General Counsel is rejected.

Skipping, for the moment, to the above-described category, relating to bid or special rated jobs, such a situation requires a different conclusion in the light of the Board's Decision in the recent case of *MCC Pacific Valves, a unit of Mark Controls Corporation.*[11] In that case, as here, the facts showed that shortly after the strike ended, respondent posted jobs for bidding by em-

[6] Of course, all of these striker replacements were not hired at one time; some were employed to replace other striker replacements who did not report for work, or quit, or were discharged shortly after commencing employment.

[7] By September 19, 1977, 29 strikers had voluntarily returned to work. Mooneyhan testified that, after the aforesaid list came into existence in the personnel office, strikers would be called pursuant to said list (in the event of a vacancy) prior to the employment of a striker replacement.

[8] It should be noted that there was no strike settlement agreement entered into between the Company and the Union; however, the Company did agree that, when it recalled strikers pursuant to the Union's unconditional offer, they would be recalled according to their seniority.

[9] The applicable provisions of the expired collective-bargaining agreement setting forth the rules and procedures governing these working conditions are attached hereto as "Appendix B." [Omitted from publication.]

[10] *The Laidlaw Corporation*, 171 NLRB 1366 (1968).

[11] 244 NLRB 931 (1979).

ployees then on the payroll including permanent strike replacements and reinstated strikers. At the time these jobs were posted, there remained a number of strikers who had not yet been reinstated and who were, in fact, qualified to perform the posted jobs. However, some posted jobs were offered to unreinstated strikers only if there were no successful bidders on those jobs from within the plant. The Administrative Law Judge held that the respondent in that case had not violated the Act by not offering initial job vacancies to strikers awaiting reinstatement. The Board disagreed, stating as follows:

> We do not agree with the Administrative Law Judge's conclusions in this regard. It is, of course, well settled that an economic striker is entitled to full reinstatement to his former job or to a substantially equivalent job upon an unconditional offer to return to work.[7] Although an employer has the right not to discharge those replacements to make room for returning strikers,[8] an employer must, when and if a job becomes available for which a striker is qualified, offer that job to an economic striker. An employer may refuse to reinstate a striker only if it shows substantial and legitimate business reasons for doing so.

[7] See *N.L.R.B.* v. *Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967); *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); and *The Laidlaw Corporation*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

[8] *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

Here, as in *MCC Pacific Valves*, it is clear "that at least some job vacancies occurred because of the departure of strike replacements from those jobs . . . .[12] In opening those jobs for bidding and in filling them, Respondent was *not* entitled to prefer strike replacements then on the payroll to qualified strikers awaiting reinstatement."[13]

Respondent, in its brief, seeks to distinguish *MCC Pacific Valves* on the ground that:

> There is no evidence in the record to suggest that the Company transferred employees on its active workforce to fill vacancies created by the *departure* from the *plant* of permanent replacements or reinstated strikers; nor is there any evidence to suggest that the Company discriminatorily manipulated its reinstatement procedure in order to by-pass strikers when it needed to add to its workforce; nor is there any evidence that the Company ever took any action to discriminatorily deny strikers reinstatement by terminating their *Laidlaw* rights and cutting off their seniority; nor is there any evidence to rebut the Company's documentary and testimonial proof that these transfers were made for sound business reasons. To the contrary, the evidence establishes that the Company did not deviate from its recall procedure, a procedure which was designed and implemented to return strikers to their prestrike jobs as the need for additional employees arose.

[12] See quotation from brief of counsel for the General Counsel, *infra*.

[13] *MCC Pacific Valves*, 244 NLRB at 933.

I cannot agree with the foregoing contentions with respect to the special rated jobs. Whether the special rated job opening arose as a result of a departure from the plant of a permanent replacement or a reinstated striker, or whether it arose from a need by Respondent to add to its workforce, the fact remains that a job opening arose for which a striker was qualified and available, and that he was admittedly denied the opportunity even to bid for such job without a showing by Respondent of a substantial and legitimate business reason therefor. As the General Counsel shows in his post-hearing brief:

> Thus, between the end of the strike and the end of calendar 1977, a total of 40 replacements departed their jobs. During the same period of time, Respondent transferred a total of 59 striker replacements to different jobs (G.C. Exh. 29(b)). Of these 59 transfers, 31 involved the transfer of striker replacements into bid, or special rated jobs (G.C. Exh. 29(b)), and in 13 of these 31 instances, striker replacements were upgraded from production jobs to special-rated or bid jobs (G.C. Exh. 29(b)).

Thus, in the light of the Board's holding in *MCC Pacific Valves*, it is my view, and I therefore find, that Respondent violated Section 8(a)(1) and (3) of the Act when, with respect to special rated or bid jobs, Respondent filled such jobs by first offering them to employees on the existing payroll rather than to qualified strikers awaiting reinstatement.

Returning to the category respecting permanent transfers not involving special rated jobs, Respondent relies on *Kennedy & Cohen of Georgia, Inc.*,[14] in support of its position that it was not unlawful to transfer an employee presently on the payroll to a permanent job rather than to recall an unreinstated striker.

In *Kennedy & Cohen*, the striker (who had previously been actively employed as a salesman) made an unconditional offer to return to work in June. The following month, respondent transferred a former supervisor (Sharp) to a salesman's position. The Board held:

> The Administrative Law Judge concluded that Sharp was a new hire in July and therefore striker Keenum was entitled to the position which he filled. In view of Respondent's uncontradicted evidence, it appears that Sharp was not a new hire, but an old employee who was shifted from a supervisory position to a nonsupervisory sales position for a nondiscriminatory reason. Respondent was not required to prefer a striker to Sharp in making the transfer. [218 NLRB at 1176.]

Although the *Kennedy & Cohn* case was not referred to by the Board in *MCC Pacific Valves*, it seems to have been overruled at least to the extent that, in such situations, respondent employers are now required to prefer unreinstated strikers to employees then on the payroll

[14] 218 NLRB 1175 (1975).

unless the employer can show "substantial and legitimate business reasons for doing so."[15]

The record shows that, under the prior contract, Respondent was free to make interdepartmental moves of similarly rated employees when needed so long as least senior employees were those affected. (Art. VII, sec. 16.) This provision was doubtlessly inserted in the contract to enable the Company to transfer employees freely within the plant to similar job functions existing in the various departments. The record shows that this policy continued during and after the strike. Thus, no discriminatory motive may be gleaned from a change in means or method of production and, unlike the situation in *MCC Pacific Valves* where the Board discredited the company's business reasons for its conduct,[16] the Company here made available and/or produced documentary evidence in support of its position.[17] Moreover, there was no such evidence as existed in *Laher Spring & Electric Car Corp.*, 192 NLRB 464 (1971), of a "scheme" to avoid reinstatement of strikers.

There is no evidence that, with respect to a transfer of a production employee to another classification for a period exceeding 10 consecutive days, the Company made any attempt to comply with the bid procedure prescribed in article VII, section 14, of the previous contract. This is consistent with its failure to apply the shift preference section (art. VII, sec. 8) discussed *infra*, and reflects a general policy on the part of Respondent not to honor the provisions of the expired contract absent express agreement to do so. There would seem to be some merit in such a position in the light of the Board's language in *Bio-Science Laboratories*, 209 NLRB 796 (1974):

> The Administrative Law Judge found, and we agree, that under *The Laidlaw Corporation* unreinstated economic strikers do not have the statutory right to recall in accordance with a collective-bargaining agreement provision covering recall from layoffs where the parties have not agreed to the application of such a clause to the reinstatement of economic strikers.

Moreover, I note that, unlike the situation in *MCC Pacific Valves* and some other similar situations,[18] Respondent here executed no strike settlement agreement or new contract with the Union following the termination of the strike. Indeed, a decertification petition was filed and an election held. (See discussion *infra.*)

Finally, the record reflects, as previously noted, a substantial percentage of reinstated strikers were transferred along with the strike replacements into new positions. Such entanglement seriously negates, in my view, a discriminatory purpose, and seems to illustrate that situation envisaged by the Board in *MCC Pacific Valves*:

> We recognize that not every job opening is one that an unreinstated striker, though qualified, is *entitled* to fill. There may be circumstances, for example, in which the rights of unreinstated strikers may conflict with the rights of those strikers who *have* been reinstated or even with the rights of permanent strike replacements. However, we find it unnecessary under the circumstances of this case to reach and pass on these issues. [244 NLRB 931, 934, fn. 15.]

Thus, it is entirely conceivable that a striker, recalled to a "substantially equivalent job," desires to be transferred to his prestrike job, and the respondent is willing to do so, but is prevented therefrom because there are still some unreinstated strikers awaiting recall who are qualified for his position. Upon what theory could respondent be held to be in violation of Section 8(a)(3) and (1) by transferring the returned striker rather than recalling an unreinstated striker?

In view of all of the foregoing, I conclude and find that no violation of Section 8(a)(3) and (1) occurred by Respondent's post-strike transferring of production employees within the plant rather than recalling unreinstated strikers to such jobs.

D. *The Alleged Discriminatory Refusal To Recall Strikers Immediately Upon Their Unconditional Request for Reinstatement*

As previously noted, the normal complement of employees in the unit prior to the strike was approximately 400. Although Respondent hired in excess of 400 persons as permanent replacements during the course of the strike, the record reflects that there were only approximately 360 employees in the unit at the end of the strike.[19] Counsel for the General Counsel argues that Respondent deliberately refused to fill job vacancies through the recall of strikers at that time. Respondent claims that it had ample business justification for not immediately recalling a large number of strikers at that time.

The principal argument of Respondent is that, as previously set forth, it was required by its customers, during an annual period which encompassed the termination of a collective-bargaining agreement, to build up an inventory of finished goods to a level which would carry it through at least a 30-day period should a work stoppage

[15] A *caveat* to this rule may appear where the employee on the payroll is a reinstated striker, as discussed *infra.*

[16] 244 NLRB at 934: "However, these asserted reasons, particularly with respect to the production imbalance, are incredibly general and are unsupported by either specific facts or documentary evidence, due in part, perhaps, to the fact that the strike lasted only 1 month."

[17] Thus, company records reflect that approximately 75 percent of all employees were transferred at least once during the course of their employment; and that approximately 40 percent of the strikers reinstated after the strike (until 10-1-78) were transferred at least once. (The above figures were taken from G.C. Exh. 36, which was rejected for the purpose offered, but there is no question as to the authenticity of the documents (personnel cards).) The records further show that some of the transfers involved merely a change from one production job to another without a significant change in rate of pay while other transfers involved a change to a higher classification with commensurate higher pay scales.

[18] See, e.g., *United Aircraft Corporation (Pratt & Whitney Division)*, 192 NLRB 382 (1971).

[19] The record shows that many of the permanent replacements hired either did not ever report to work or quit their employment shortly thereafter.

occur. Because of such inventory buildup the production requirements of Respondent following the strike were such as to not require the hiring of a substantial number of additional employees until February 1978.[20]

In light of the foregoing evidence of business justification, which is unrefuted on the record, I find that Respondent met its burden of establishing the defense that a substantial number of unreinstated strikers was not required for its production immediately upon termination of the strike, and strikers were recalled as needed when production schedules rose following the commencement of calendar year 1978.[21]

E. *The Hiring of 13 Nonstrikers as New Employees in December*

An issue is presented respecting the recall by the Company of some 13 strike replacements hired during the strike who thereafter ceased, for various reasons, to be active employees of the Company, but were thereafter recalled to work by Personnel Manager Mooneyhan on or about December 5, 1977. It is the contention of Respondent that these 13 persons (who are named in G.C. Exh. 46) were on "leaves of absence" and therefore the recall of them to active employment in December did not constitute a hiring of a new employee. It is the contention of counsel for the General Counsel that these persons left the employment of Respondent during the strike, and that their recall in December constituted a violation of the Act since, under the *Laidlaw* doctrine, an unreinstated striker should have been recalled. I agree with counsel for the General Counsel.

Personnel Director Mooneyhan testified that he discovered in December that there were employees who had not picked up their payroll checks, and that there was no reason on these employees' records of why they had left their employment; that no supervisor had notified the personnel department that they had been fired; and that he had not fired them or laid them off—"So, we didn't have any idea what the status of those people were [sic]." Mooneyhan decided to telephone them to ascertain their status, and testified that he called the persons individually; that they gave various reasons for not being at work such as illness, nervous breakdown, etc.; that he (Mooneyhan) told the persons to be at work the following Monday or Tuesday or he would "write them off." When the persons returned to work, Mooneyhan treated their absences as a "leave of absence," and made such a notation on their personnel status cards.

Gerald Hopkins was the only 1 of the 13 who testified at the hearing. He stated that he commenced employment with Respondent during the strike, as a painter, but that after working at the plant for approximately 2 weeks, he called in one Monday morning and told a lady in the office that he was sick and could not come to work that day. The following day, he reported to work and explained to his supervisor what had happened the previous day, but the supervisor told Hopkins that he could not use Hopkins any more. Hopkins assumed that he had been discharged and did not return to the plant. Hopkins testified that, about a month later, Mooneyhan telephoned him at his home and said that there was an opening on the night shift and asked Hopkins whether he wanted to work. Hopkins replied affirmatively, and the record shows that he returned to active employment with Respondent on December 5, 1977, in the packing department.

It is apparent from the foregoing that Hopkins never requested nor received from Respondent permission for a "leave of absence" as that term is normally utilized in labor relations parlance. The uncontroverted evidence is that he was terminated, although the supervisor apparently neglected to notify the personnel department of such action.[22] Moreover, according to Hopkins' testimony, Mooneyhan did not even make inquiry as to the circumstances under which Hopkins left his employment, but simply inquired whether Hopkins wanted to return to work, and he answered yes.

In view of all the foregoing circumstances, I am convinced, and therefore find that none of the named 13 strike replacements, including Hopkins, were ever, in fact, granted "leave of absence" by Respondent but left Respondent's employment for various reasons including discharge or voluntarily quitting; that Respondent, however, apparently preferring to recall strike replacements rather than unreinstated strikers to employment in December, utilized the label "leave of absence" so as to create the impression that the recall of the 13 was not as new employees. Accordingly, I conclude and find that the failure to recall 13 unreinstated strikers on or about December 5, 1977, to fulfill those jobs constituted a violation of Section 8(a)(1) and (3) of the Act.[23]

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[20] For comparison purposes, the record reflects that, in August 1976, Respondent had a finished goods inventory of approximately 9.5 units; in August 1977, such inventory reached a level of almost 19.5 units; at the end of the strike in middle October, it had declined to approximately 13.5 units; and, by January 1978, it had reached a level of slightly over 8 units.

[21] *Pillows of California*, 207 NLRB 369 (1973). *Laher Spring & Electric Car Corp., supra*, relied on by counsel for the General Counsel, is distinguishable. In that case, the Board found that respondent deliberately failed and refused to recall strikers since a strike settlement agreement entered into between the company and the union provided that the strikers would lose all rights to reinstatement and be treated as new employee applicants if they were not reinstated within 6 months following the termination of the strike. Moreover, the respondent failed to produce records of unfilled and filled orders which it possessed which created an adverse inference respecting the true state of affairs regarding such subject matter. In the instant case, the hearing was adjourned *sine die* to allow inspection of the Company's business records in this regard, and, when the hearing reconvened, counsel for the General Counsel did not present any evidence in rebuttal to the Company's evidence of business justification.

[22] Mooneyhan testified that, as might be expected in the circumstances, there was a substantial amount of confusion in the personnel office during the course of the strike.

[23] The same result would be reached with respect to Louis E. Turnage and Cheryl I. Turnage (man and wife) who were strike replacements hired on September 19, 1977. Both worked in the plant until December 14 and 8, respectively, when they quit in order to move to California. About a week later, they came into Mooneyhan's office and advised that they were unable to leave because of inability to sell their house at that time, and wanted to return to work. Mooneyhan testified that he checked with his production supervisors who advised that they could "use them," whereupon Mooneyhan rehired them, and they worked another week or two prior to selling their house and leaving for California. Clearly, a vacancy arose for which two unreinstated strikers should have been recalled in that case.

F. *The Transfer of Five Employees From the Security Force Into Production Jobs*

The record reflects that, during the strike, Respondent employed another company to provide security about the Blytheville plant. However, Respondent found this arrangement to be too expensive, and set up its own security force consisting of approximately 12 employees. Subsequently, around the first of the year, 1978, Respondent reduced the security force to seven employees. The remaining five employees were transferred into production jobs in the plant. Counsel for the General Counsel contends that Respondent should have recalled five unreinstated strikers to fill the production jobs into which the security guards were transferred; Respondent, citing the Board's Decision in *Kennedy & Cohen of Georgia, Inc., supra*, urges that Respondent was not required to prefer a striker over its then-current employees.

The pertinent facts in *Kennedy & Cohen* and the Board's resolution of them respecting this issue have been referred to, *supra*. Also, reference has been made to the later case, *MCC Pacific Valves, supra* at 933, where the Board stated that: "An employer may refuse to reinstate a striker only if it shows substantial and legitimate business reasons for doing so." I am of the view that Respondent has not sustained its burden in this regard.

Thus, unlike the situation where Respondent hired a permanent strike replacement for a production job, and committed itself to retain such person as long as the latter performed such job proficiently, there is no evidence that Respondent made any such commitment to the security guards. Rather, Respondent relies only on its "good faith" in transferring them. In the light of the Board's holding in *MCC Pacific Valves*, I am of the view that this is not sufficient, and accordingly find and conclude that by transferring the guards into production jobs in January 1978, rather than recalling unreinstated strikers, Respondent violated Section 8(a)(3) and (1) of the Act.

G. *The Shift Preference Issue*

The complaint, as amended, alleges that since on or about January 1, 1978, Respondent has refused to permit its employees who engaged in the strike to use seniority to transfer to preferred shifts. The record discloses that there was a provision in the collective-bargaining agreement between Respondent and the Union prior to the strike, which provided for shift preference based on seniority. However, the contract expired on September 8, 1977, and there was no agreement between Respondent and the Union subsequently respecting shift preference. Accordingly, the Company concedes that its policy subsequent to the strike did not permit employees to exercise seniority to obtain shift preference. Counsel for the General Counsel, relying on *Moore Business Forms, Inc.*,[24] argues that Respondent thereby violated Section 8(a)(3) and (1) of the Act since it treated the strikers as new employees with respect to the assignment of departments and shifts. Respondent takes the position that, since the collective-bargaining agreement terminated, no policy existed with regard to shift preference and therefore, in the absence of any union animus or preferential treatment to permanent replacements in regard to shift changes, no violation occurred.[25]

In *Bio-Science Laboratories*, there was an economic strike during which the company and the union negotiated with respect to the issue of the reinstatement of strikers. During such negotiations, the union took the position that the striker replacements should be terminated and the strikers reinstated to their former jobs, but the respondent refused to do so. After the strike was called off, the union urged the company to treat the strikers as laid-off employees and to recall them in accordance with a collective-bargaining agreement provision regarding recall from layoffs. The company refused that proposal and finally implemented its own reinstatement system. The Board found that, since the parties had not agreed to the application of the recall provision respecting the reinstatement of economic strikers, such unreinstated strikers did not have the statutory right to recall in accordance with such provision under the *Laidlaw* doctrine.

In *Moore Business Forms, supra*, the company had operated pursuant to a rotating shift system of employment (employees changed shifts weekly). After the commencement of an economic strike, respondent commenced operations pursuant to a fixed shift system of employment which, it claimed, was required in order to train replacements during the strike. It is apparent that the necessary effect of such change in operations "insured that virtually all returning strikers were permanently assigned to the less desirable second and third shifts. The strikers who came back to work early, the employees who did not strike, and the workers hired to replace strikers were permanently assigned to the more desirable first shift. The Board found that the institution of fixed shifts, over the opposition of the union, operated to discriminate between strikers and non-strikers and had a destructive impact upon the strike.[26] The Administrative Law Judge, affirmed by the Board, found that the institution of the fixed shifts was comparable to the award of superseniority considered by the Supreme Court in *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963). He went on to find:

> The institution of fixed shifts, like the superseniority, operated to discriminate between strikers and nonstrikers, both during and after the strike, and had a destructive impact upon the strike and union activity. As such, it carried its own indicia of intent and, as there was no overriding business justification for continuing the fixed shifts beyond the hiring and training period for strike replacements, the business purpose asserted by Respondent was insufficient to insulate the change from the reach of Section 8(a)(1) and (3) of the Act. [224 NLRB at 407–408.]

[24] 224 NLRB 393 (1976), enfd. in pertinent part 574 F.2d 835 (5th Cir. 1978).

[25] In support of its contention, Respondent cited *Bio-Science Laboratories*, 209 NLRB 796.

[26] *N.L.R.B.* v. *Moore Business Forms, Inc., supra* at 840–841.

Since Respondent's conduct in this case served as an inducement to strikers to abandon the strike early in order to avoid assignment to the less desirable second and third shift which had the necessary effect of "weakening the union's strike effort" (*N.L.R.B.* v. *Moore Business Forms, Inc., supra* at 841), the change in policy from acknowledging shift preference based on seniority to one that did not had a "destructive impact upon the strike and union activity" (*Moore Business Forms, Inc.*, 224 NLRB at 407–408). As the court concluded:

> In the absence of a showing of an "overriding business purpose justifying the invasion of union rights," *N.L.R.B.* v. *Erie Resistor Corp., supra*, 373 U.S. at 231 . . . the company's institution of fixed shifts violated Section 8(a)(1) and (3) of the Act. [574 F.2d at 841.]

Here, as in *Moore*, I find no "overriding business purpose justifying the invasion of union rights" in altering the shift preference policy previously existing; accordingly, I find that, by unilaterally nullifying such policy, Respondent violated Section 8(a)(1) and (3) of the Act.

H. *The Medical and Life Insurance Issue*

For a period of time prior to the events giving rise to the issues in this case, Respondent maintained a noncontributory group life, accident, and medical insurance plan, under contract with Aetna Life and Casualty Company, which administered the plan. All employees of Respondent in the unit were covered under the plan; however, the plan provided that such coverage would cease at the end of any month when an employee's employment terminated or if he ceased to be a member of a class eligible for coverage. The plan provided as follows respecting the ceasing by an employee of active work:

> Ceasing active work will be considered to be immediate termination of employment, except that if you are absent from active work because of sickness, injury, temporary layoff, or leave of absence, or on account of being pensioned or retired, employment may be deemed to continue for the purposes of some of the coverages up to the limits specified in the complete plan description on file with your employer.[27]

If an employee does not come within any of the foregoing exceptions, he loses coverage under the plan for a period of 60 days after he returns to work.[28]

As applied to the facts herein, it will be recalled that the strike commenced September 8, 1977. Strikers who did not return to work until after October 1, 1977, were not covered under the plan until "the first day of the calendar month following completion of 60 days of service." (G.C. Exh. 60.) Thus strikers were treated differently under the plan from employees who ceased active work pursuant to other exceptions to the rule enumerated above.

Respondent seeks to escape any responsibility or liability on this issue on the ground that the administration of the plan was through Aetna Company, and Respondent had no right unilaterally to change any provision of the plan. Moreover, argues the Company, strikers were treated no differently from permanent replacements under the eligibility provision of the plan.

In my view, the resolution of this issue is controlled, like the shift preference issue discussed above, by the decision of the Board in *Moore Business Forms, supra*. There, the strikers were faced with a 90-day delay in the resumption of insurance coverage upon their return to work, and were therefore, for that period of time, treated as new employees with regard to their health insurance. The Administrative Law Judge, affirmed by the Board, ruled that such conduct by respondent, even absent an antiunion motivation, fell within the "inherently destructive category" of employee benefits which the Board might find to constitute an unfair labor practice even if the employer introduced evidence that the conduct was motivated by business considerations (citing *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. at 34; *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. at 228).[29]

The court of appeals, enforcing the Board's Order in this regard, stated:

> The company's action of paying medical benefits for non-striking employees while denying, for 90 days, the same benefit to employees who had participated in a strike had a discouraging effect on both present and future concerted activities. As with the institution of fixed shifts, we find this company action to be inherently destructive of employee interests carrying its own indicia of intent. Moore had the burden of explaining or justifying its actions. *N.L.R.B.* v. *Erie Resistor Corp., supra*. Without such an explanation by Moore that a legitimate business end was served by the waiting period requirement, the company's action constituted an unfair labor practice. [574 F.2d at 842.]

Accordingly, in the absence of substantial evidence that a legitimate business end was served by the waiting period requirement, I find that, by requiring the strikers who returned to work following the end of the strike to undergo a waiting period for the resumption of their insurance coverage, Respondent violated Section 8(a)(3) and (1) of the Act.

I. *Additional Allegations of Independent 8(a)(1) Violations*

The record reflects that, shortly after the end of the strike, on October 21, 1977, a petition was filed with the Board which stated that "a substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative."[30] Thereafter, on November 16, 1977, the Board

[27] G.C. Exh. 60.

[28] This is assuming that the individual employee in such circumstances did not exercise a right to convert to an individual policy. However, none of the strikers herein converted to an individual policy.

[29] 224 NLRB at 407–408, *supra*.

[30] Case 26-RD-381.

conducted an election which the Union won. Subsequently, Respondent filed timely objections to the election, which were eventually overruled. The complaint herein contains several allegations of violations of the Act which arose, apparently, in connection with, or as a consequence of, that proceeding.

1. James L. Dixon

Employee James L. Dixon testified that, on the day before the election, he received a telephone call from Plant Manager Jack Melvin in which the latter said, "James, if the union goes out, I'll call you back to work in a few days." Dixon assertedly replied, "Well, Jack, I don't know which way I'm going to vote. I ain't gonna tell nobody which way I'm going to vote." Melvin responded (according to Dixon), "Well, I thought you were a better man than that." Melvin denied that he initiated any calls to Dixon, but admitted having two telephone conversations with Dixon (misspelled Dickson in some places in the transcript) around this period of time, which Dixon initiated. In the first conversation, Dixon asked Melvin did the latter know when he would be called back to work, and Melvin responded that he would be called back when the Company reached his name on the seniority list, but that Melvin could not give Dixon any idea as to when that would be. About a week or 10 days later, Dixon telephoned Melvin again (according to Melvin's testimony) and in that conversation Dixon stated that some people had told him (Dixon) that Melvin was trying to reach him. Melvin denied the correctness of that assertion, and that was all there was to the conversation.

After careful consideration of the inherent probabilities surrounding the situation, along with the demeanor of the witnesses, I have concluded that Melvin's version of the events should be credited. It is significant, in my view, that this is the only incident (out of approximately 400 unit employees) of an alleged request by Melvin of an employee to vote against the Union in the upcoming election. No reason appears from the record as to why Dixon should have been picked by Melvin for such an alleged telephone call. Moreover, Melvin's version is more consistent with his role in the process respecting the recall of strikers and the manner in which that process operated. That is to say, the actual recall of named strikers was performed by a lower level of supervision, and was there for all to see. If Dixon, or any other striker, was recalled out of turn, everyone concerned would have been apprised of the matter and it would have been a subject of investigation.

In view of all of the foregoing circumstances, I will recommend that this allegation of the complaint be dismissed.

2. Diane Malone

Employee Diane Malone was a striker who had not been recalled to work in November 1977. She testified that, approximately 2 weeks after the decertification election on November 16, 1977, she was at a local bowling alley where her son was engaged in bowling. While there, she had a conversation with Plant Manager Jack Melvin, who also happened to be in the bowling alley. No other person was present during the conversation. According to the testimony of Malone, Melvin asked if she would "get up a petition against the Union." She responded that she would if he, in turn, would put her name on a list to be called back to work ahead of other strikers. Again, according to Malone's testimony, Melvin first objected, but then agreed with her proposal. She proceeded to draw up and circulate such a petition and, according to her testimony, persuaded approximately five other strikers to sign it. She testified that she gave it back to Melvin at the bowling alley the following Monday, according to a prearranged schedule, but that no conversation occurred at that time.

Melvin acknowledged that, on one occasion, he had a conversation with Malone at the bowling alley where his son also bowls; that the conversation consisted only of Malone's approaching him to ask if he would put her name on the unconditional return to work list (i.e., the first list), and that he advised that he could not comply with her request.

There was no third party present at the conversation between Melvin and Malone.

After careful consideration of the factors surrounding this incident, I am unable to credit Malone's version. In the first place, it seems highly unlikely that Melvin would ask her to promulgate another petition to decertify the Union at a time when the Company's objections to the election were still pending. Moreover, there was no corroboration of the signing of any such petition by any other employee-striker. Under all the circumstances, I shall therefore recommend that this allegation of the complaint be dismissed.

3. Alleged interference with employees' Section 7 rights by the Company's attorney

There is basically no dispute as to the facts giving rise to this issue. As previously noted, following the decertification election on November 16, 1977, Respondent filed objections to the election. Subsequently, the Board ordered a hearing on these objections, and an investigator of the Board took some affidavits from employees of Respondent pursuant thereto.[31] The Company's attorney requested the Board's investigator to make a request of the employees whose affidavits were taken whether the latter had any objection to having a copy furnished to the Company. However, the Board's investigator never did make such a request of the employees. This fact was later learned by the Company's attorney, whereupon, on April 13, 1978, he went to the Blytheville plant and talked to each of the employees previously interviewed by the Board's investigator.[32] The employees were called individually to the personnel office by a personnel clerk. Waiting in the office were Company Attorney Hawkins and then Personnel Manager Harry Burge.

[31] The affidavits were taken in the Company's offices in Blytheville. The names of the employees from whom the affidavits were taken were apparently supplied to the Board's investigator by Respondent's attorney.

[32] The great majority of these employees had previously been interviewed by Company Attorney Hawkins who had taken statements from them to support the Company's objections to the election.

Each employee was first advised that their attendance was not mandatory. Hawkins then advised the employees of their rights enunciated by the Board in *Johnnie's Poultry Co.*,[33] to wit: That the purpose of the questioning was to enable Hawkins to prepare for the hearing on objections, that he was not interested in their union proclivities, and that no conditions were attached to them talking to him, and no promises were made and no threats to their jobs, or otherwise, were issued. After that, he asked if they had given the Board investigator an affidavit (yes) and did they receive a copy of said affidavit (no). Hawkins then asked if they would like to have a copy of their affidavit (yes), and if they had any objection to the NLRB giving him a copy of their affidavit prior to the hearing. If they said no, he asked them to sign the following letter addressed to the Regional Director of the NLRB in Memphis, Tennessee:

> I hereby request that you send me a copy of my affidavit taken by Board Agent Jack Blankenship during his investigation of the Employer's Objections and that, upon presentation of this letter, you give the Company's attorney, Michael W. Hawkins, a copy of my affidavit.
>
> I have been fully advised of my rights and realize that I am under absolutely no obligation to furnish the Company a copy of my affidavit.

To the knowledge of Respondent's attorney, the employees never did get copies of their affidavits.

Citing *Daybreak Lodge Nursing and Convalescent Home, Inc.*, 230 NLRB 800 (1977), counsel for the General Counsel argues that the conduct of Respondent's attorney, cited above, constituted interference, restraint, and coercion of employees' Section 7 rights in violation of Section 8(a)(1) of the Act. In that case, the Board affirmed the findings and conclusions of an Administrative Law Judge who found, in the circumstances of that case, a violation of the Act. In so finding, he noted:

> The Board's latest pronouncement in this area seems to indicate that it will consider whether such conduct [an employer's request for affidavits given by employees to Board agents] is unlawful in the circumstances of each case (*Martin A. Gleason, Inc.*, 215 NLRB 340 (1974), enforcement denied 534 F.2d 466 (2d Cir. 1976)). [230 NLRB at 803–804.]

In the *Gleason* case, a three-member panel of the Board (then Chairman Miller dissenting) found an employer's request for statements "in the context of other serious unfair labor practices . . . may be interpreted by the affected employees as an order with the consequent invasion of their Section 7 rights." The majority went on to point out that the *Robertshaw Controls* case[34] relied on by the dissent involved a request for statements "in the context of very minor unfair labor practices, involving a small number of employees, and that there was no wholesale investigation by the Board of antiunion activities on the part of the Company."

Placing the facts in the instant case against the principles enunciated by the foregoing authorities, I conclude, and therefore find, that no violation of the Act occurred respecting the requests of Respondent's attorney for the employees' affidavits. Like the court of appeals in *Robertshaw Controls*,[35] I am persuaded by the reasoning of the trial examiner (affirmed by the Board) in *Atlantic & Pacific Tea Company*, 138 NLRB 325, 334–335 (1962):

> But the issue here is confined to whether or not Respondent's conduct in obtaining copies of these affidavits was in violation of Section 8(a)(1) of the Act. I am constrained to find that it was not. The evidence shows that Smith but *requested* the employees to obtain copies of their affidavits for the purposes indicated. He did not, as the General Counsel alleges, demand that they be produced. In the absence of any threats, harassment, or undue persuasion, I am compelled to find that Smith's conduct in this regard was not in violation of Section 8(a)(1) of the Act.

Based upon the foregoing, I shall recommend that this allegation of the complaint be dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By failing and refusing to offer unreinstated strikers the opportunity to bid on special rated jobs in preference to strike replacements then on the payroll, Respondent violated Section 8(a)(1) and (3) of the Act.
4. By failing and refusing to accord recalled economic strikers their shift preference according to their seniority, Respondent violated Section 8(a)(1) and (3) of the Act.
5. By discriminating against recalled economic strikers by requiring them to undergo waiting periods for the resumption of their group life, accident, and medical insurance plan, Respondent violated Section 8(a)(1) and (3) of the Act.
6. Respondent violated Section 8(a)(1) and (3) of the Act when, following the end of the strike, it hired or recalled 13 named strike replacements from so-called leaves of absence rather than recall unreinstated strikers to those jobs.
7. Respondent violated Section 8(a)(1) and (3) when, following the end of the strike, it hired or recalled two strike replacements who had quit their employment, rather than recalling unreinstated strikers to those jobs.
8. Respondent violated Section 8(a)(1) and (3) of the Act when, following the termination of the strike, it transferred into production jobs five security guards rather than recall reinstated strikers to those jobs.
9. Respondent has not, except as specifically found above, violated the Act as alleged in the complaint, as amended.

[33] 146 NLRB 770 (1964).

[34] *Robertshaw Controls Company, Lux Time Division*, 483 F.2d 762 (4th Cir. 1973).

[35] *Id.* at 769.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Inasmuch as Respondent has failed to reinstate strikers in a timely fashion because of the unfair labor practices described above, it will be recommended that Respondent offer reinstatement to those strikers who were not reinstated as a consequence of those unfair labor practices (to the extent that it has not already done so), and make all strikers whole for any loss of pay they may have suffered by reason of Respondent's discrimination against them, such payment to be made in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[36]

It having been found that Respondent unlawfully terminated its shift preference policy, it will be recommended that it be required to reinstitute such policy and implement it to all recalled strikers where appropriate.

It having been found that Respondent unlawfully required strikers who returned to work to undergo a 60-day waiting period as a prerequisite for insurance coverage pursuant to Respondent's group life, accident, and medical plan, it will be recommended that strikers be made whole for any losses they may have suffered as a result thereof, in the manner set forth above.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[37]

The Respondent, Randall, Burkart/Randall, Division of Textron, Inc., Blytheville, Arkansas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to offer to qualified unreinstated strikers the opportunity to bid on special rated jobs in preference to strike replacements on the payroll.

(b) Refusing to accord recalled economic strikers their right to shift preference.

(c) Transferring security guards to production jobs in preference to unreinstated economic strikers.

(d) Hiring or recalling strike replacements, following the strike, in preference to unreinstated economic strikers.

(e) Requiring reinstated economic strikers to undergo waiting periods for the resumption of their group life, accident, and medical insurance coverage.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of any of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer reinstatement and backpay to any unreinstated strikers who, at the compliance stage of this proceeding, are discovered to have been denied an opportunity to bid upon special rated jobs, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Offer reinstatement and backpay to strikers who were unlawfully denied reinstatemcnt because Respondent hired or recalled strike replacements to production jobs, or transferred security guards to production jobs following the termination of the strike on October 16, 1977.

(c) Reinstate the practice of shift preference by seniority.

(d) Make whole all striking employees for any losses they may have suffered through lack of group insurance coverage subsequent to the date they returned to work, or would have returned to work, but for Respondent's unfair labor practices, in accordance with the provisions of the section of this Decision entitled "The Remedy."

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its plant in Blytheville, Arkansas, copies of the attached notice marked "Appendix."[38] Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the said Regional Director in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[36] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[37] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[38] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."